CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Alfred C. Lombardelli concerning the Department of Corrections' Memorandum dated 1/22/90 on the subject of "Housing of Life Commitments"[1]	1992 OAL Determination No. 1 [Docket No. 90-010] January 13, 1992 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: MARZ GARCIA, Director

Herbert F. Bolz, Supervising Attorney
Mathew Chan, Staff Counsel
Regulatory Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a Department of Corrections' memorandum concerning the transfer of life prisoners to designated correctional institutions is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the challenged memorandum is a "regulation."

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the 1/22/90 memorandum ("challenged memorandum") of the Department of Corrections ("Department"), concerning the transfer of certain life prisoners to designated locations to facilitate processing of parole hearings is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [4],[5],[6],[7],[8]

OAL finds that:

(1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) the challenged memorandum is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) the challenged memorandum violates Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal (Second District, Division 3) described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
>
> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to

whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, the state established additional institutions, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[11] The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"[12] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[13]

Authority [14]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations ("CCR"). This policy has changed dramatically in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[15] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[16] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[17]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's

Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 85 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.[18]

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.[19] The manuals were the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. Beginning in late 1987, the Department began the process of combining all six existing manuals into a single "California Department of Corrections Operations Manual" (referred to by the acronym "DOM). So far, Volumes I, II, III, V, VI, VII, and VIII of the new DOM have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. Until its deletion in October 1990, a preface to Chapter 1, Division 3, Title 15 of the CCR stated in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Courts have struck down portions of the second tier for failure to comply with APA requirements.[20] Prior to 1991, courts had invalidated the Classification Manual[21] and parts of the Administrative Manual[22] (and unincorporated "Administrative Bulletins").[23] In a September 1991 unpublished decision, the California Court of Appeal (Fifth Appellate District), ordered the Department to "cease enforcement of those portions of the Department of [sic] Operations Manual that require compliance with the [APA] pending proof of satisfactory compliance with the provisions of the Act."[24] Similarly, OAL regulatory determinations have found the Classification Manual,[25] several portions of the Administrative Manual,[26] and several portions of the Case Records Manual[27] to violate Government Code section 11347.5-.[28]

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.[29] These plans often repeat parts of statutes, Director's Rules (i.e., codified regulations), and procedural manuals.[30]

Background: This Request for Determination

This Request for Determination was submitted by Alfred C. Lombardelli, an inmate at the correctional facility in Jamestown, who alleges that the Department has adopted a policy which prescribes the transfer of certain life prisoners to designated locations to expedite the parole hearing process. The Department's policy on the matter is reflected in a memorandum from the Department, dated 1/22/90 and subject titled "Housing of Life Commitments." The memorandum was addressed to all wardens, to the attention of "Classification & Parole Representatives." It states in part:

> "The Board of Prison Terms (BPT) is facing an excessive number of parole consideration hearings beginning in 1990. The hearing schedules are being impacted by the number of 15-Life Commitments who are now becoming eligible for parole consideration. The recent court decision in [In re Monigold[31],[32]] has also served to advance a significant number of parole consideration hearings and the BPT has been ordered to treat these cases as priorities.
>
> "Because of the limited number of Commissioners available to meet this demand, the Department of Corrections (CDC) will attempt to assist by housing Life Commitments at institutions that are clustered in specific regions, thereby reducing to a degree the required travel time for BPT panel members.
>
> "Listed below are institutions that have been designated to review all Life Commitments for transfer:
>
> Avenal State Prison
> California Correctional Center
> Chuckawalla Valley State Prison
> Mule Creek State Prison
> Northern California Women's Facility
> R. J. Donovan Correctional Facility
> San Quentin State Prison
> Sierra Conservation Center
>
> "Life Commitments are to be reviewed by Classification Committee action and recommended for transfer to an institution consistent with case factors when the inmate is approximately 12-18 months from his/her next

BPT Parole Consideration Hearing. Transfer effected within this time frame will allow the inmate to demonstrate to staff and to the BPT a behavior/program pattern that will reflect some consistency.

"The institutions to which the inmates are to be recommended for transfer are:

North	Central	South
CMF	CCI	CIW
CMF-S	CMC	CRC
DVI	COR	RJD[33]
FOL	CTF	
PBSP		
MCSP[34]		

"There is no need to move inmates who are pending Documentation hearings, nor are Parole Revocation or Parole Revocation Extension hearings subject to this concern. Also, there is no need to adhere to the above time frames when considering inmates who have previously been found suitable for parole and are pending Progress Hearings. Any such inmates may remain at their current facilities and be transferred to a nearby institution for the hearing only.

"Classification Manual 2161 is to be observed. Classification Staff Representatives (CSR) are being instructed not to transfer inmates who are within 90 days of their scheduled Parole Consideration Hearings. It is therefore suggested, following your review of these Life Commitments, that transfer be considered for inmates with BPT hearings scheduled for May 1990 and later. Transfer of these identified inmates will be treated as a priority, especially for those within eight months of a scheduled hearing. This priority status is to be communicated to the Transportation Unit when requesting bus seats. . . ."

On November 16, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[35] along with a notice inviting public comment. No public comments were received. On December 31, 1990, the Department submitted its response to this request ("Response").

II. ISSUES

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED BULLETIN CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED BULLETIN FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

> "As used in this title [Title 2. 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The Department of Corrections is clearly a "state agency" as that term is defined in Government Code section 11000. Further, Government Code section 11342, subdivision (b), provides that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."[36] Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.[37]

In addition, Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

Supplementing the pertinent Government Code provisions, Penal Code section 5058, subdivision (a) specifically requires that "rules . . . for the administration of the prisons. . . . shall be [adopted pursuant to the APA]."

SECOND, WE INQUIRE WHETHER THE CHALLENGED BULLETIN CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supple-

> ment or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,[38] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either
>
> - a rule or standard of general application or
> - a modification or supplement to such a rule?
>
> Second, has the challenged rule been adopted by the agency to either
>
> - implement, interpret, or make specific the law enforced or administered by the agency or
> - govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the ap-

plicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][39]

A. Part One - Does the Challenged Memorandum Establish A Rule or Standard of General Application or a Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes."

In its Response, the Department argues that the challenged memorandum is "non-regulatory" to the extent that it does not represent a rule of general application. It cites to Government Code section 11343, which states in part:

> "Every state agency shall:
>
> "(a) Transmit to the [OAL] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
>
> ". . .
>
> "(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."[40] [Emphasis added.]

The above-quoted statutory language does not apply in this instance. It was evidently written to exempt from the APA process specific orders, directives or decisions stemming from quasi-judicial proceedings involving particular individuals. Note that the statute refers to a specifically "named" person or group of persons, not merely to an identifiable person or group of persons. No specific person or group of persons were "named" in the challenged memorandum. Further, the memorandum clearly has general application.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[41]

Although the number of persons affected by the challenged memorandum is limited, the persons affected are nonetheless of a distinct class - i.e., life prisoners eligible for a parole consideration hearing within 12 to 18 months (but beyond 90 days of their next scheduled hearing) who are incarcerated in any of the 8 remote correctional facilities specified. The class of persons affected would constantly change since life prisoners at those institutions would reach the 12 to 18 month time frame at different intervals. The class is also not limited to those inmates presently housed at the eight specified correctional facilities since

it is possible for inmates from anywhere in the state to be transferred into one of those specified facilities. A life prisoner who is not scheduled for a parole consideration hearing for years may be transferred to one of the eight facilities only to be later transferred to one of the designated hearing facilities as the inmate's hearing date approaches.

Since the challenged memorandum applies to all members of a class, we deem it to have general application.

B. Part Two - Does the Challenged Memorandum Establish A Rule Which Interprets, Implements, or Makes Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

Again, the answer is "yes."

The Department argues that the memorandum only instructs staff with "non-regulatory internal management information" and does not implement, interpret, or make more specific those requirements established by law. According to the Department, the memorandum "is non-regulatory as the information relates solely to processing of certain life-term inmates according to the Department's existing regulations which were adopted pursuant to the APA or which exist in laws of the Penal Code." The Department, however, does not deny that the challenged memorandum governs agency procedure.

The Department cites Penal Code sections 5003.5, 5054 and 5080 to argue that it has the necessary authority to issue staff instructions in regard to the management of State prisons. Section 5003.5 states in part:

> " . . . It is the intention of the Legislature that the Board of Prison Terms and the Director of Corrections shall cooperate with each other in the establishment of the classification, transfer, and discipline policies of the Department of Corrections, to the end that the objectives of the State Correctional System can best be attained. . . ."

Section 5054 states:

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director."

Section 5080 states in part:

> "The Director of Corrections may transfer persons confined in one state prison institution or facility of the Department of Corrections to another. . . ." [Emphasis added.]

The Department's reliance on these quoted provisions is misplaced. We do not question the Department's authority to transfer prisoners.[42] The fact that an agency has been authorized by statute to perform a certain function (e.g., to transfer prisoners) in no way obviates the need to adopt as regulations those supplementary general rules formulated by the agency in order to implement, interpret, or make specific the law administered by the agency.[43] Regulation sections 3375 through 3379, also cited by the Department, illustrate this point. Those regulations were adopted to implement, interpret or make specific some of the above-cited statutes and to govern agency procedure.[44] For example, regulation section 3379, which pertains to "Inmate Transfers," specifically cites Penal Code sections 5054 and 5080 as reference in the "NOTE" portion of that regulation.

The existence of regulation sections 3375 through 3379 does not bolster the Department's position. Those sections establish a classification system whereby prisoners may be evaluated and placed in a facility having the appropriate custody rating. The factors used to determine classification scoring is specified in regulation section 3375, which states in part:

> "(b) The classification process for felon inmates shall include a standardized classification scoring system wherein specific weight, positive or negative, shall be assigned to selected case factors relating to the inmate's precommitment history, commitment offense, and the term of imprisonment. The factors shall include, but are not limited to, the inmate's age, history of employment and education, and documented behavior during previous terms of imprisonment. A lower classification score shall indicate lower security control needs, and a higher score shall indicate a need for greater security control. A higher initial score shall result from case histories reflecting negative factors, including physically assaultive behavior, drug involvement, escapes, and failure to participate in assigned work, vocational or educational programs during previous terms of imprisonment. . . .
>
> "(c) Each felon inmate's classification score shall be recalculated periodically, but no less often than every 12 months. The recalculated classification score shall be based on selected and weighted case factors documenting the inmate's favorable and unfavorable conduct while incarcerated. An increase in score shall result from documented negative behavior, including, but not

limited to, a finding of guilt for any serious rule violation as described in Section 3315 or failure to participate in assigned work, vocational or educational programs. A reduction in score shall result from documented positive behavior, including, but not limited to, participation in assigned work, vocational or educational programs and the lack of rule violations as described in 3315. . . ."

Section 3379 establishes requirements and restrictions for inmate transfers. It states in part:

"(a)(1) Any inmate transfer from a facility other than a reception center shall require a classification committee action and endorsement by a classification staff representative (CSR).

"(2) An inmate for whom a recall of commitment report under provisions of Penal Code Section 1170(d) is required, shall not be transferred, . . .

"(3) Except in emergencies or for special housing, inmates shall not be transferred within 90 days of their release date, or within 90 days of a Board of Prison Terms (BPT) appearance. . . .

"(4) A warden or superintendent may temporarily suspend a scheduled inmate transfer. . . .

"(5) If an inmate has not transferred within 30 days of CSR endorsement, the sending institution shall report that fact to the Chief, Classification Services . . .

"(6) Transfer to another state. . . .

"(7) Transfer to a federal prison. . . .

"(8) An inmate may, prior to scheduled transfer, revoke their consent to transfer to out-of-state or federal prison.

"(b) Placement in level. An inmate endorsed for any level placement and transferred to an institution with several levels shall be placed in the endorsed level facility within 60 days of arrival or shall be referred to the next scheduled CSR for alternative action. . ." [Emphasis added.]

Note that being within 12-18 months of one's scheduled parole consideration hearing is not a stated factor in either classification scoring or in transfer determinations. While the challenged memorandum does not appear to conflict with existing statutes or regulations, it outlines procedure not covered by statute or regulation. The challenged memo-

randum, therefore, does not constitute a mere reflection of existing law.

We conclude that the challenged memorandum interprets, implements and makes specific the law and governs agency procedure.

WE THUS CONCLUDE THAT THE CHALLENGED BULLETIN IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED BULLETIN FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[45] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[46]

The Department contends that the challenged rules fall within the internal management exception. That argument lacks merit.

According to Government Code section 11342, subdivision (b), every general rule (i.e., every "standard of general application") adopted by any agency either (1) to implement, interpret, or make specific the laws enforced by it or (2) to govern its procedure is a "regulation" which must be adopted pursuant to the APA, "except one which relates only to the internal management of the state agency." (Emphasis added.) Grier v. Kizer, which provides a good summary of case law on internal management, states that this exception is "narrow."[47]

After quoting Government Code section 11342, subdivision (b), the Grier Court states:

> "Armistead v. State Personnel Board, supra, 22 Cal.3d at pages 200-201, 149 Cal.Rptr. 1, 583 P.2d 744, determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the

> . . . statutes. . . . ." [Fn. omitted.]' (Id., at pp. 203-209, 149 Cal.Rptr. 1, 583 P.2d 744, [emphasis added by Grier Court]."
>
> "Armistead cited Poschman v. Dumke (1973) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, which similarly rejected a contention that a regulation related only to internal management. The Poschman court held: '"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community'."' (Armistead, supra, 22 Cal.3d at p. 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.) [48]"
>
> "Relying on Armistead, and consistent therewith, Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, held a Department of Corrections'' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population" in its custody.'
>
> "By way of example, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by Armistead's holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception."

The challenged memorandum does not fall within the narrow internal management exception. It cannot be disputed that the memorandum affects not only the employees of the issuing agency, but inmates as well. According to the memorandum, certain life prisoners who would have previously had their parole hearings scheduled at their place of confinement now have to be moved to designated locations where the hearings will be held. Such action has great impact on the quality of the lives of the prisoners. In a memorandum to R. H. Denniger, Deputy Director of the Institutions Division, Terry Yearwood, Chief of Classification Services, stated:

> "The only area that may adversely affect a number of inmates has to do with family contact."

This quoted statement makes clear that the challenged memorandum significantly affects a number of inmates and thus cannot be deemed to fall within the internal management exception.

Our review also discloses that no other exceptions would apply to the challenged memorandum. Having found the Department's memorandum to be a "regulation" and not exempt from the requirements of the APA, we conclude that the memorandum violates Government Code section 11347.5, subdivision (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) the memorandum dated 1/22/90 is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) the Department's memorandum violates Government Code section 11347.5, subdivision (a).

DATE: January 13, 1992

HERBERT F. BOLZ
Supervising Attorney
Regulatory Determinations Unit

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225
ATSS 8-473-6225
Telecopier No. (916) 323-6826

1. This Request for Determination was filed by Alfred C. Lombardelli, who at the time of the filing of the request, was an inmate in a correctional facility in Jamestown, California. The Department of Corrections was represented by Tony Loftin, Assistant Chief, Regulation and Policy Management, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year. Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

   Cases discovered since third survey

Case No. 1--Conroy v. Wolff (1950) 34 Cal.2d 745 (commission cannot decline to award credit for meritorious service in civil service examination in the absence of validly adopted rule or regulation).

Summary: Under the charter of the City and County of San Francisco, city commissions are empowered to adopt supplementary rules, but under the charter these rules (1) must be published, (2) one week's notice must be given, and (3) no change in the rules can affect a case pending before the commission. Also, according to the San Francisco Municipal Code, commission rules of "general public concern" must be posted in a conspicuous place or made available for public inspection. Petitioner Conroy, a San Francisco Police lieutenant, participated in a promotional examination for captain. Originally scheduled for November 6, 1946, the examination was postponed until December 12, 1946. On December 5, Lieutenant Conroy was awarded a "meritorious award" for services performed in connection with an arrest occurring November 16, 1946. Award of examination credit for meritorious service was mandatory under the city charter. The city Civil Service Commission declined to award Conroy the mandatory credits, however, on the grounds that the originally scheduled exam date of November 6 had been designated as the official cut-off date for computation of both seniority and meritorious award credits. This decision placed Conroy 15th on the list of eligibles; he would have been 8th if granted the credits. The Commission had duly adopted a cut-off date rule applying to seniority credits; it argued that the same rule was intended to apply to meritorious service credits.

The California Supreme Court unanimously ruled for Conroy. The Court held that while the Commission may well have had the power to adopt a cut-off date rule applying to meritorious service credits, that since the Commission had not complied with the legal requirements pertaining to adoption of rules, there was no validly adopted rule. The Court concluded: "[i]n the absence of a valid rule or regulation prescribing a different date the reasonable implication to be drawn from provisions of the charter is that the cutting off for the application of meritorious service credits should be not earlier than the date the examination is scheduled." (34 Cal. 2d at 748.)

The basis for the Court's conclusion that one of the municipal rulemaking requirements applied to the Commission was that awarding of credits for meritorious service appeared to be a matter "of general public concern." Cf. Poschman v. Dumke (1973) 31 Cal.App.2d 932, 944, 107 Cal.Rptr. 596, 603 (rule concerning awarding of tenure to state college professor was not within California APA internal management exception because "tenure within any school system is a

matter of serious consequence involving an important public interest." [Emphasis added.]

Case No. 2--Wallace v. State Personnel Board (1959) 168 Cal.App.2d 543 (Board cannot use uncodified provision in Personnel Transactions Manual to restrict clear and unambiguous provisions of statute and duly adopted regulation).

Summary: California Government Code section 18100 provides for sick leave credits for all state civil service personnel upon submission of satisfactory proof of the necessity thereof. Implementing this statute, the State Personnel Board duly adopted Title 2, California Administrative Code, section 401, defining sick leave as ". . . the absence from duty of an employee because of his illness or injury, his exposure to a contagious disease, his attendance upon a member of his immediate family who is seriously ill and requires the care or attendance of the employee, ..." [Emphasis added.] Wallace, a state employee, was fired based upon section 502 of the Personnel Transactions Manual (the same uncodified Manual at issue 19 years later in the case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1). Section 502 (the Manual provision invoked against Wallace) provided that an employee seeking sick leave must be physically incapacitated if his request for absence is based upon an emotional disturbance. Following Conroy v. Wolff (case no. 1, above), the Court rejected the Board's argument that the Manual provision was entitled to great weight as an administrative interpretation, noting that such an interpretation would not be followed if it (1) altered or enlarged the terms of a statute or (2) was erroneous. The Wallace Court stated:

> "It is well established that an administrative directive such as is embodied in section 502 does not have the force of law and hence may not be asserted as a standard for the conduct of the agency if the assertion would in any way effect a change in the meaning of section 401 of the Administrative Code. (Conroy v. Wolff . . . .) If, as was held in Nelson v. Dean . . . , [section 18100 of the Government Code] does not limit sick leave to physical illness [Nelson upheld as consistent with the statute the awarding of sick leave to an employee caring for an ill relative], then it follows that the administrative directive embodied in section 502 of the Transactions Manual cannot be used to so restrict the purpose and intent expressed in section 401 of the Administrative Code or 18100 of the Government Code. If the provisions of the Transactions Manual may not be so used, then it also follows that the provisions of section 401 of the Administrative Code, which are clear and unambiguous, must be given

their obvious meaning that illness may be mental as well as physical."

Cf. 1990 OAL Determination No. 16 (Department of Personnel Administration policy requiring state employees using sick leave to reveal the specific nature of their illness found to violate Government Code section 11347.5). 1990 OAL Determination No. 16 (Department of Personnel Administration, Dec. 18, 1990, Docket No. 89-023), CRNR 91, No.1-Z, p. 40.) As in Conroy, the rule challenged in 1990 OAL Determination No. 16 was found invalid because it had not been duly adopted in accordance with applicable legal requirements.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. The Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010),

California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.50 ($4.50 if mailed).

9. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or

other rule, which is a [']regulation[']
as defined in subdivision (b) of Section
11342, unless the guideline, criterion,
bulletin, manual, instruction, order,
standard of general application, or other
rule has been adopted as a regulation and
filed with the Secretary of State pursuant
to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation[']
as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

11. Penal Code section 5000.

12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.-Rptr. 778, 781.

13. Penal Code section 5054.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.
The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be

decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

16. Id.

17. For instance, Government Code section 11346.7, subdivision (b), requires a "final statement of reasons" for each regulatory action.

18. Section 3 of Statutes of 1975, chapter 1160, at page 2876, states:

> "It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]

19. Manuals were intended to supplement CCR provisions. The former Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to

> implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]
>
> [This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5. This preface was deleted in October 1990, after 14 years on the books.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

20. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the

Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement.

Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

21. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Hershipps & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)

22. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

23. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

24. Tooma v. Rowland (F015383) (Sept. 9, 1991).

25. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

26. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

27. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

28. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).

29. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

30. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

31. In re Monigold (1988) 205 Cal.App.3d 1224, 253 Cal.Rptr. 120, mod. in adv. sheets 253 Cal.Rptr. yellow pages p. 10, petition for review denied Feb 16, 1989.

32. "In In re Monigold . . . , the Fourth District Court of Appeal, Division Three, announced . . . that state prisoners serving indeterminate sentences of 15 years to life, 25 years to life, or life with the possibility of parole are ineligible for worktime credits under Penal Code section 2933. That court held, however, that the doctrine of equitable estoppel prevented the Board of Prison Terms from converting all of the petitioner's earned 'day-for-day' worktime credit to 'day-for-two' conduct credit. The court directed the Board of Prison Terms:

"'. . . to allow petitioner the worktime credits he accumulated during the period he was enrolled in the Penal Code section 2933 program until he was notified of his ineligibility and to recalculate his [Minimum Eligible Parole Date] and initial parole hearing date accordingly [Monigold, supra, 253 Cal.Rptr at p. 125]'" [Footnotes omitted.]

(1989 Oal Determination No. 14 (Department of Corrections,

September 21, 1989, Docket No. 90-001) CRNR 89, No. 40-Z, October 6, 1989, p. 2947.)

33. The copy of the memorandum submitted by the Requester shows that this designation was handwritten. Its origin, therefore, is uncertain.

34. Id.

35. California Regulatory Notice Register 90, No. 46-Z, November 16, 1990, pp. 1678-1679.

36. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld in May 1991 in a decision of the San Francisco Superior Court, which is currently being appealed by the losing side. State Water Resources Control Board v. Office of Administrative Law, SCN 906452, AO 54599 Div. Copies of the 30-page trial court statement of decision are available from OAL (phone Melvin Fong at (916) 324-7952) for a charge of $7.00 (postage included).

37. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi--legislative activities); Poschman v. Dumke (1973) 31 Cal.-App.3d 932, 943, 107 Cal.Rptr. 596, 603.

38. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

39. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

40. We have previously had occasion to analyze the applicability of this exception. See 1989 OAL Determination No. 4 (State Water Resources Control and San Francisco Regional water Quality Control Board), March 29, 1989, Docket No. 88-006), CRNR 89, No. 16-Z, April 21, 1989, p. 1026).

41. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of

general application applies to all members of any open class).

42. See note 14.

43. See, e.g., Engelmann v. State Board of Education (Dec. 26, 1991), California Court of Appeal, Third District.

44. In its Response, the Department stated:

> "The authority to transfer inmates in an effort to facilitate the [Board of Prison Terms'] scheduling needs is provided for by implementation of Penal Code sections 5003.5 and 5080 with the adoption of 15 CCR sections 3375 through 3379, which are the Department's regulations establishing the classification and transfer requirements of inmates." [Emphasis added.]

45. Government Code section 11346.

46. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d

365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like Grier v. Kizer, 1990 OAL Determination No. 6 rejected the idea that City of San Joaquin (cited above) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code sec-

tion 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $162.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

47. It has been argued that Americana Termite Co. v. Structural Pest Control Board (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693, supports the proposition that an agency's policy decisions fall within the "internal management" exception. As we discussed at some length in 1990 OAL Determination No. 18 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88), the dictum in Americana Termite is misleading and should not be relied upon.

48. Armistead disapproved Poschman on other grounds. (Armistead, supra, 22 Cal.3d at p. 204, fn. 2, 149 Cal.Rptr 1, 583 P.2d 744.)